IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OANH D. KOHN and DONNA MARIA FREEMAN	:	CIVIL ACTION
v.	:	
LEMMON COMPANY, et al.	:	NO. 97-3675

MEMORANDUM AND ORDER

HUTTON, J. February 18, 1998

Presently before this Court is the Defendants' Motion to Dismiss (Docket No. 5), and the parties' responses thereto. For the reasons set forth below, the defendants' Motion is **GRANTED in part and DENIED in part.**

I. BACKGROUND

The plaintiffs have alleged the following facts. Plaintiff Oanh D. Kohn ("Kohn") "is a female of Asian descent and was born in Vietnam." Pls.' Compl. ¶ 13. Kohn was hired by defendant Lemmon Company ("Lemmon") in 1982 as an inspector. Id. ¶ 14. In 1990, Kohn was "transferred to the Quality Control Laboratory within the Stability and Finished Products Department, in a utility position." Id. Beginning in 1992, defendant David DeLong ("DeLong"), "a Group Leader of the Stability and Finished Products Department at Lemmon," started "a pattern and practice of severe and pervasive on-going gender and sexual harassment and discrimination towards" Kohn. Id. ¶ 15. DeLong's conduct

included "offensive and unwanted touching and offensive remarks." Id. DeLong's actions continued in this manner through 1996.\[1] Id.

Despite Kohn's complaints, Lemmon "took no remedial action." Id. ¶¶ 20, 25. Moreover, even after Kohn filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC"), Lemmon failed to correct the situation. Id. ¶ 21. Kohn's repeated requests for a transfer from DeLong's group were also denied.

On or about January 24, 1996, Kohn met with Defendant George Welch ("Welch"), Lemmon's Director of Quality Control. "At this meeting, Ms. Kohn told Welch that she was upset because Defendant DeLong and the other men in his group were ridiculing, harassing and intimidating her on the basis of her gender and national origin." Id. ¶ 27. Welch told Kohn that "it was all in her head and that she was making it up." Id. Moreover, Welch

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1. The plaintiffs include several examples of DeLong's conduct during this period, including:

> a. Defendant DeLong telling Ms. Kohn that she was his girlfriend and that he had a "big penis."
> b. On an occasion when Ms. Kohn was eating, Defendant DeLong said to her "Sucking? I like a woman who can suck on me."
> c. Defendant DeLong would approach Ms. Kohn on a consistent on-going basis and put his arm around her while commenting: "You're my woman, will you marry me?" He would often make fun of her accent.

Pls.' Compl. ¶ 17. Moreover, several other Lemmon employees in DeLong's group acted in a similarly offensive manner. Id. ¶ 19.

sent Lemmon's Human Resources Department a memorandum stating that Kohn was paranoid. Id. ¶ 29.

On or about January 31, 1996, Kohn met with Lemmon's Director of Human Resources, Ms. Marjorie Cauley ("Cauley"). Id. ¶ 30. Cauley told Kohn "that she must immediately begin counseling through the Employee Assistance Program ("EAP") or Ms. Kohn would lose her job." Id. Contrary to Lemmon's written policies, neither Welch nor Cauley investigated Kohn's complaints of discrimination and harassment. Id. ¶¶ 27-29, 31.

Even after Kohn filed her complaint with the EEOC, several Lemmon employees, including DeLong, made sexual and threatening comments toward her. Id. ¶ 39. Moreover, several of these comments made reference to Kohn's Asian heritage. Id. On some occasions, Lemmon supervisors were present but refused to reprimand the appropriate Lemmon employees. Id. Kohn began to keep "a log of the incidents of harassment against her," although she was reprimanded by Cauley for doing so. Id. ¶ 39(h).

Pursuant to Cauley's demand, Kohn agreed to undergo psychological counseling. Id. ¶ 42. However, Lemmon employees soon learned of Kohn's counseling. Id. In response, Lemmon employees berated Kohn with disparaging remarks concerning her mental fitness. Id. ¶ 44.

Plaintiff Donna Freeman ("Freeman") was hired by Lemmon in 1989, as a Laboratory Technician in the Finished Products

Group of the Quality Control Laboratory ("Laboratory"). Id. ¶ 48. In 1991, Freeman "was transferred to the Raw Materials Group within the Laboratory." Id. Defendant Dan Cocco ("Cocco") is Group Leader of Raw Materials at Lemmon and was Freeman's supervisor. Id. ¶ 50.

Beginning in 1993, Cocco started "a pattern and practice of severe and pervasive on-going sexual harassment and intimidation of Ms. Freeman." Id. ¶ 50. Cocco's conduct included "offensive and unwanted touching and offensive remarks." Id. ¶ 51. Cocco's actions continued in this manner through 1996.\[2] Id. ¶ 50. Despite Freeman's complaints to Lemmon supervisors, Cocco's actions continued. Id. ¶¶ 53-56.

DeLong also supervised Freeman during the relevant period. Id. ¶ 57. Starting in 1994, DeLong began a pattern of "severe, pervasive, and on-going sexual and gender harassment and intimidation towards Ms. Freeman." Id. ¶ 58. DeLong's conduct

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2. The plaintiffs include several examples of Cocco's conduct during this period, including:

> b. Defendant Cocco would put his arms around Ms. Freeman's upper arms, squeeze hard and push on her breasts, and stare at her breasts. Ms. Freeman asked Defendant Cocco on several occasions to stop this offensive and unwanted behavior, but he still continued to engage in this behavior from time to time.
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> c. On an on-going basis, Defendant Cocco would come up behind Ms. Freeman's chair and massage Ms. Freeman's shoulders in the area of her bra straps. When she tried to stop this offensive and unwanted behavior, he would pat Ms. Freeman on her back and say "you love it."

Pls.' Compl. ¶ 51. Moreover, at least one other Lemmon employee in Cocco's group acted in a similarly offensive manner. Id. ¶ 60.

included "offensive and unwanted touching and offensive remarks." Id. ¶ 59. DeLong's actions continued in this manner through 1996. Id. Despite Freeman's complaints to Lemmon supervisors, DeLong's actions continued. Id. ¶ 59.

After Freeman complained to Lemmon's management regarding these acts, she was "consistently . . . denied promotion and training opportunities in retaliation." Id. ¶ 64. Despite having the necessary education and experience, Welch and other Lemmon managers refused to consider Freeman when vacancies became available. Id. ¶¶ 63-65. On at least two occasions, Lemmon hired males for open positions, instead of promoting Freeman. Id. ¶¶ 65, 69. Moreover, after Freeman complained to Welch, she was put on probation. Id. Lemmon supervisors also refused to provide Freeman with advanced training that was provided to male employees. Id. ¶¶ 71-74.

The plaintiffs filed the instant suit on May 27, 1997. In their Complaint, they name the following parties as defendants: (1) Lemmon; (2) Welch, individually and as Director of Quality Control of Lemmon; (3) DeLong, individually and as a Group Leader of Lemmon; and (4) Cocco, individually and as a Group Leader of Lemmon. The plaintiffs assert numerous causes of action under: (1) the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. ("ADA"); (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"); (3) 42

U.S.C. § 1981; and (4) the Pennsylvania Human Relations Act, 43 P.S. § 951, et seq. ("PHRA").\[3] On August 1, 1997, the defendants filed the instant motion to dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. DISCUSSION

A. Legal Standard

1. Standard For Dismissal Under Rule 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a district court can grant a dismissal based on the legal insufficiency of a claim. Dismissal is proper only when the claim clearly appears to be either immaterial and solely for the purpose of obtaining jurisdiction, or is wholly insubstantial and frivolous. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir.), cert. denied, 501 U.S. 1222 (1991). When the subject matter jurisdiction of the court is challenged, the party that invokes the court's jurisdiction bears the burden of persuasion. Kehr Packages, 926 F.2d at 1409 (citing Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977)). Moreover, the district court is not restricted to the face of the pleadings, but may review any evidence to resolve factual

3. Kohn asserts a cause of action against: (1) Lemmon, under Title VII (Count I), the ADA (Count II), Section 1981 (Count III), and the PHRA (Count VI); (2) Welch, under Section 1981 (Count IV) and the PHRA (Count VII); and (3) DeLong, under Section 1981 (Count V) and the PHRA (Count VIII). Freeman asserts a cause of action against: (1) Lemmon, under Title VII (Count IX) and the PHRA (Count X); (2) Welch, under the PHRA (Count XI); (3) Cocco, under the PHRA (Count XII); and (4) DeLong, under the PHRA (Count XIII).

disputes concerning the existence of jurisdiction. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1052 (1989).

2. Standard for Dismissal under Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),\[4] this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be

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4. Rule 12(b)(6) provides that:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

B. Analysis of Plaintiffs' Claims

In the present motion, the moving defendants have raised three general issues. First, they assert that plaintiff Kohn has failed to allege a valid claim against Defendants Welch and DeLong under Section 1981. Second, they contend that the plaintiffs' claims under the PHRA against defendants Welch, DeLong, and Cocco in their individual capacities should be dismissed, because these individual employees may not be sued under the PHRA. Third, they argue that plaintiff Kohn has failed to exhaust her administrative remedies under the ADA.

1. Section 1981

Section 1981 provides in relevant part that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence,

> and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1994). Although Section 1981 has proven effective in battling discrimination, its scope is limited to cases of race discrimination. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). Thus, these sections may only be invoked when discrimination is alleged against "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Id.

a. Hostile Working Environment

"Congress amended § 1981 in 1991 to allow suits for workplace harassment. See 42 U.S.C. § 1981(b). [Accordingly, c]laims of a hostile working environment that arise after 1991 are . . . actionable under § 1981." Simpson v. Martin, Ryan, Andrada & Lifter, No.CIV.A.96-4590, 1997 WL 542701, at * 3 (N.D. Cal. Aug. 26, 1997) (citations and footnote omitted).

The Supreme Court has articulated a standard for hostile environment cases that "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Section 1981 is violated when a workplace is permeated with

"discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. (quoting Meritor Savings Bank, 477 U.S. at 65, 67). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive" is not actionable. Id. The Third Circuit has defined "pervasive" as "when incidents of harassment occur either in concert or with regularity." Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990) (quoting Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987)).

The fact finder must look at the totality of the circumstances to determine whether an environment is "hostile" or "abusive." The circumstances may include:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris, 510 U.S. at 23.

b. Retaliation

Retaliation claims are also actionable under Section 1981. Patterson v. Augat Wiring Sys., Inc., 944 F. Supp. 1509, 1519-21 (M.D. Ala. 1996); see Freeman v. Atlantic Ref. & Mktg. Corp., No.CIV.A.92-7029, 1994 WL 156723, at * 8 (E.D. Pa. Apr. 28, 1994) ("Section 1981's prohibitions against discrimination extend to the same broad range of employment actions and conditions as in Title VII."). To make out a prima facie case of retaliation, the plaintiff must show that: (1) she engaged in protected conduct; (2) her employer took adverse action against her; and (3) there was a causal link between the protected conduct and the adverse action. Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997); Nelson v. Upsula College, 51 F.3d 383, 386 (3d Cir. 1995); Datis v. Office of Atty. Gen., No.CIV.A.96-6969, 1998 WL 42267, at * 7 (E.D. Pa. Jan. 16, 1998); Tuthill v. Consolidated Rail Corp., No.CIV.A.96-6868, 1997 WL 560603, at * 2 (E.D. Pa. Aug. 26, 1997).

c. Individual Liability

An individual may be liable for injuries suffered by another because of that individual's Section 1981 violations. However,

> [A] claim seeking to impose personal liability under Section 1981 must be predicated on the actor's personal involvement and there must therefore be some affirmative link to casually connect the actor with the discriminatory action. Allen v. Denver Pub. Sch. Bd., 928 F.2d 978, 983 (10th Cir. 1991). Accordingly, directors,

> officers and employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable. Al-Khazraji v. St. Francis College, [784 F.2d 505, 518 (3d Cir. 1986), aff'd, 481 U.S. 604 (1987)].

Johnson v. Resources for Human Dev., Inc., 843 F. Supp. 974, 978 (E.D. Pa. 1994). Moreover, "individuals are personally involved in the discrimination . . . if they authorized, directed, or participated in the alleged discriminatory conduct." Al-Khazraji, 784 F.2d at 518.

d. Plaintiff Kohn's Section 1981 Claims

(1) Defendant DeLong

(a) Hostile Work Environment

In the instant case, Kohn alleges that DeLong created a hostile working environment by harassing Kohn because of her Asian descent. More specifically, Kohn claims that DeLong "would often make fun of her accent." Pls.' Compl. ¶ 17. Furthermore, "DeLong said in Ms. Kohn presence: 'I should buy some throwing stars, put them in my car and get rid of that bitch.'" Id. ¶ 39(d). The following day DeLong said to a fellow employee: "Just kill the bitch and get it over with." Id. ¶ 39(e). "Graphic and offensive sexual and ethnic material circulated around the laboratory where Ms. Kohn worked on a routine basis." Id. ¶ 19(g). DeLong also made several sexual remarks towards Kohn. Id. ¶ 17.

DeLong contends that these events are isolated and are thus insufficient to constitute a hostile working environment. Defs.' Mem. at 14. Because Kohn specifically included only a few allegations concerning DeLong's racial comments, DeLong argues that Kohn has failed to adequately plead a Section 1981 claim for hostile work environment. Id. Moreover, DeLong contends that his racial-neutral comments should not be considered by this Court in its determination of whether Kohn pled a viable Section 1981 claim. Defs.' Reply at 6.

DeLong misunderstands the nature of an employment discrimination claim under Title VII, the ADA, the PHRA, and Section 1981. As this Court recently stated:

> These statutes prohibit discriminatory conduct on the basis of certain protected categories, such as national origin and disability. Thus, the prohibited discriminatory conduct must be driven by an animus towards these protected categories. In this case, where the discriminatory conduct is verbal harassment, the insults must be driven by animus towards [the plaintiff's] national origin and disability. There is no requirement, as [the defendant] argues, for the content of the insults to reflect the discriminatory animus.
>
> In this case, the Court believes the record is sufficient for a reasonable juror to find that the insults cited by [the defendant], while neutral in content, were nonetheless driven by a discriminatory animus towards a protected category. Apart from the insults cited by [the defendant], the record shows that [the plaintiff] was subjected to numerous ethnic slurs and insults relating to his disability. These insults are evidence of discriminatory animus on the part of the

> persons who spoke them. When these same persons then singled out [the plaintiff] for the use of content-neutral insults, a reasonable inference can be drawn that these insults were also the result of discriminatory animus.

Rivera v. Domino's Pizza, Inc., No.CIV.A.95-1378, 1996 WL 53802, at * 5 (E.D. Pa. Feb. 9, 1996).

Taking all reasonable inferences in Kohn's favor, and considering DeLong's alleged "discriminatory intimidation, ridicule, and insult" towards Kohn, this Court finds that Kohn has pled a viable Section 1981 cause of action against DeLong, under a hostile work environment claim. DeLong's alleged verbal abuse was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris, 510 U.S. at 21 (quoting Meritor Savings Bank, 477 U.S. at 65, 67). Moreover, Kohn has alleged facts that, if true, prove that DeLong "intentionally cause[d] an infringement of rights protected by Section 1981," and "participated in the alleged discriminatory conduct." Al-Khazraji, 784 F.2d at 518. Thus, DeLong may be held personally liable under Section 1981. Accordingly, the Defendants' Motion to Dismiss is denied as it relates to DeLong's "unlawful discrimination." Pls.' Compl. ¶ 96.

(b) Retaliation

Kohn also alleges that, after she complained, DeLong retaliated against her in violation of Section 1981. Kohn's "internal complaints of . . . discrimination and harassment . . . were clearly protected activity." Datis, 1998 WL 42267, at * 7. Moreover, Kohn alleged that Welch "took adverse action against her" after she complained to Welch. Pls.' Compl. ¶ 39(d), (e). Also, there was a causal link between the protected conduct and the adverse action. Taking all reasonable inferences in Kohn's favor, DeLong "may have been impermissibly motivated against her due to her . . . complaints." Id. Further, Kohn has alleged facts that, if true, prove that DeLong "intentionally cause[d] an infringement of rights protected by Section 1981," and "participated in the alleged discriminatory conduct." Al-Khazraji, 784 F.2d at 518. Accordingly, the defendants' Motion to Dismiss is denied as it relates to DeLong's "retaliatory behavior." Pls.' Compl. ¶ 96.

(2) Defendant Welch

(a) Hostile Work Environment

Kohn alleges that Welch created a hostile work environment by failing to properly supervise the "various employees who had been harassing her." Pls.' Sur-Reply at 14; see Pls.' Compl. ¶ 93. "A supervisor's failure to prevent or remedy harassment is not an affirmative link making [the supervisor] personally liable. While employer-entities have the

legal duty to prevent and correct harassment and discrimination in the workplace, that duty does not extend to individual employees." Simpson, 1997 WL 542701, at *4. Accordingly, the Defendants' Motion to Dismiss is granted as it relates to Welch's "unlawful . . . discriminatory behavior." Pls.' Compl. ¶ 93.

(b) Retaliation

Kohn also alleges that, after she complained, Welch retaliated against her in violation of Section 1981. On January 24, 1996, Kohn met with Welch and "told [him] that she was upset because Defendant DeLong and the other men in his group were ridiculing, harassing and intimidating her on the basis of her gender and national origin." Pls.' Compl. ¶ 27. In response, Kohn alleges that Welch wrote a false memorandum to Lemmon's Human Resource Department stating that Kohn was paranoid. Id. ¶ 29. In order to retain her job with Lemmon, Kohn was required to undergo psychiatric counseling. Id. § 30.

Kohn has clearly alleged a proper Section 1981 claim based on her allegations of Welch's retaliatory conduct. First, Kohn's "internal complaints of . . . discrimination and harassment . . . were clearly protected activity." Datis, 1998 WL 42267, at * 7. Second, Kohn alleged that Welch "took adverse action against her" by writing a memorandum to Lemmon's Human Resources Department stating that Kohn had a mental illness. Third, there was a causal link between the protected conduct and

the adverse action. Taking all reasonable inferences in Kohn's favor, Welch "may have been impermissibly motivated against her due to her . . . complaints." Id. Moreover, Kohn has alleged facts that, if true, prove that Welch "intentionally cause[d] an infringement of rights protected by Section 1981," and "participated in the alleged discriminatory conduct." Al-Khazraji, 784 F.2d at 518. Accordingly, the defendants' Motion to Dismiss is denied as it relates to Welch's "retaliatory behavior." Pls.' Compl. ¶ 93.

2. Individual Liability Under the PHRA

In Counts VII and XI, respectively, Kohn and Freeman allege that Welch violated the PHRA by performing, ratifying, encouraging, and condoning discriminatory conduct by Lemmon employees. Pls.' Compl. ¶¶ 101, 102, 116, 117. In Counts VIII and XIII, respectively, Kohn and Freeman allege that DeLong violated the PHRA through similar conduct. Pls.' Compl. ¶¶ 105, 106, 123. Finally, in Count XII, Freeman also alleges that Cocco violated the PHRA in the same manner. Pls.' Compl. ¶ 120. The defendants argue that these counts should be dismissed because the plaintiffs have failed to meet the special pleading requirements for a claim against an individual employee under § 955(e) of the PHRA.

Like Title VII, § 955(a) of the PHRA establishes liability solely for employers. See Dici v. Pennsylvania, 91

F.3d 542, 552 (3d Cir. 1996). However, the PHRA goes further than Title VII to establish accomplice liability for individual employees who aid and abet a § 955(a) violation by their employer. See 43 Pa. Cons. Stat. Ann § 955(e) (Purdon Supp. 1997) (providing liability for employees who "aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice"). The individual defendants in this case contend that the plaintiffs have failed to allege sufficient facts to support their claims of accomplice liability.

"[A] supervisory employee who engages in discriminatory conduct while acting in the scope of his employment shares the intent and purpose of the employer and may be held liable for aiding and abetting the employer in its unlawful conduct." Glickstein v. Neshaminy Sch. Dist., No.CIV.A.96-6236, 1997 WL 660636, at * 12 (E.D. Pa. Oct. 22, 1997) (citing Tyson v. CIGNA Corp., 918 F. Supp. 836, 841 (D.N.J. 1996)). "Thus, a supervisor's failure to take action to prevent discrimination, even when it is the supervisory employee's own practices at issue, can make him or her liable for aiding and abetting the employer's insufficient remedial measures." Frye v. Robinson Alarm Co., No.97-0603, at *7 (E.D. Pa. Feb. 11, 1998) (citing Glickstein, 1997 WL 660636, at * 11-13); see Wien v. Sun Co.,

Inc., No.CIV.A.95-7647, 1997 WL 772810, at *7 (E.D. Pa. Nov. 21, 1997).

In the present case, Kohn has alleged that DeLong was, in addition to being her direct harasser, her direct supervisor. Pls.' Compl. ¶ 15. Similarly, Freeman alleges that Cocco and DeLong were both direct harassers and her direct supervisors. Pls.' Compl. ¶¶ 49, 57. Kohn and Freeman also allege that these defendants failed to prevent other employees from harassing the plaintiffs. Therefore, despite the defendants' assertions to the contrary, Kohn and Freeman meet the pleading requirements for § 955(e) liability, see id., and the Court will not dismiss Counts VIII, XII, and XIII.

Kohn and Freeman also allege sufficient facts to establish § 955(e) liability for Welch. First, Kohn and Freeman each allege that Welch, as their supervisor, failed to take appropriate remedial measures. Pls.' Compl ¶ 9(a). Second, the plaintiffs allege a proper unlawful retaliation claim against Welch. Id. ¶¶ 27, 29, 65. These allegations provide an ample basis for plaintiffs' § 955(e) claims. Thus, this Court will not dismiss Counts VII and XI of the Plaintiffs' Complaint.

3. Exhaustion of Administrative Remedies Under the ADA

Defendant Lemmon argues that the ADA count against it must be dismissed because Kohn failed to file an administrative charge of disability discrimination with the EEOC. Def.'s Mem.

at 8. A claimant must exhaust administrative measures available through the EEOC before she files suit in federal court under the ADA. Saylor v. Ridge, No.CIV.A.97-1445, 1998 WL 7119, at * 2 (E.D. Pa. Jan. 8, 1998); Bracciale v. City of Philadelphia, No.CIV.A.97-2464, 1997 WL 672263, at * 7 (E.D. Pa. Oct. 29, 1997); Watson v. SEPTA, No.CIV.A.96-1002, 1997 WL 560181, at * 6 (E.D. Pa. Aug. 28, 1997). "The purpose of requiring exhaustion is to afford the EEOC the opportunity to settle disputes through conference, conciliation, and persuasion, avoiding unnecessary action in court." Antol v. Perry, 82 F.3d 1291, 1296 (3d Cir. 1996). Unless this requirement is satisfied, a federal court has no jurisdiction over the claim. See Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3d 1990) (discussing exhaustion requirements under Title VII); Glus v. G. C. Murphy Co., 562 F.2d 880, 885 (3d Cir. 1977) (same).

Kohn agrees that she failed to explicitly allege disability discrimination in her EEOC complaint. Pls.' Mem. at 12. Instead, Kohn argues that the "EEOC . . . had notice of the facts comprising a disability discrimination claim from the outset of its investigation." Pls.' Mem. at 12. Accordingly, Kohn contends that "her disability discrimination claim was within the scope of her EEOC complaint and was - or should have been- part of the EEOC investigation of her claims." Id. at 8.

In Ostapowicz v. Johnson Bronze Co., the Third Circuit stated that "the parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination, including new acts which occurred during the pendency of proceedings before the Commission." 541 F.2d 394, 398-99 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977) (citations omitted).\[5] Moreover, the Third Circuit has held that "if the EEOC investigation is too narrow, a plaintiff should not be barred from raising additional claims in district court." Robinson v. Dalton, 107 F.3d 1018, 1026 (3d Cir. 1997) (discussing Hicks v. ABT Assocs., Inc., 572 F.2d 960, 965 (3d Cir 1978)).

On March 7, 1996, Kohn filed a pro se charge of discrimination with the EEOC. In her charge, Kohn stated: "I have been subjected to sexual and ethnic harassment." Pls.' Compl. Ex. A. Moreover, Kohn claimed that she was subject to retaliatory conduct after she complained to her supervisors regarding the discrimination. Id. More specifically, Kohn wrote:

> On January 31, 1996, Cauley informed me that, as a result of a complaint about me, I would be compelled to attend counseling . . . or be

5. "The most important consideration in determining whether the plaintiff's judicial complaint is reasonably related to his EEOC charge is the factual statement." Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 197 (E.D. Pa. 1994).

> discharged; she explained that someone (who she declined to identify) had, in effect, accused me of being paranoid; the individuals who made that complaint were later identified to me as Michael Groff, Manager of Quality Control, and George Welch, Director of Quality Control . . . .
>
> I believe that, in violation of Title VII of the Civil Rights Act of 1964, as amended, I was sexually harassed because of my sex (female) and subject to slurs because of my race (Asian) and/or national origin (Vietnamese); and that I am being denied a transfer because of my sex, race, national origin and/or in retaliation for my having complained to Respondent about the sexual harassment and the ethnic slurs.

Pls.' Compl. Ex. A. Moreover, Kohn stated that a fellow employee made disparaging remarks towards her regarding the requirement that Kohn meet with a counselor. Id.

On October 7, 1996, Kohn sent the EEOC a letter discussing additional "discriminatory and retaliatory events" taken against her subsequent to her original filing. Pls.' Mem. 8. Attached to the letter was a list of events and comments substantiating Kohn's allegations. Id. Kohn made reference to several sexual and racist remarks by fellow employees and her supervisors. Pls.' Mem. Ex. A. Moreover, Kohn alleged that fellow employees teased her because she went to counseling. Id.

It is clear from Kohn's charge of discrimination and letter to the EEOC that she made several references to Lemmon's requirement that she undergo counseling for paranoia and to the teasing that followed. This Court finds that Kohn's disability

claim falls with the scope of the EEOC investigation which can reasonably be expected to grow out of Kohn's charge of discrimination. Accordingly, this Court finds that Kohn has exhausted her administrative remedies with regard to her ADA claim. Consequently, the defendants' motion is denied with respect to Count II.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OANH D. KOHN and DONNA MARIA FREEMAN	:	CIVIL ACTION
v.	:	
LEMMON COMPANY, et al.	:	NO. 97-3675

O R D E R

AND NOW, this 18th day of February, 1998, upon consideration of the Defendants' Motion to Dismiss (Docket No. 5), IT IS HEREBY ORDERED that the Defendants' Motion is **GRANTED in part and DENIED in part.**

IT IS FURTHER ORDERED that:

1) the Defendants' Motion is denied as it relates to Counts II, V, VII, VIII, XI, XII, and XIII of the Plaintiffs' Complaint;

2) the Defendants' Motion is denied as it relates to Plaintiffs' retaliation claim under Count IV of the Plaintiffs' Complaint.

3) the Defendants' Motion is granted as it relates to Plaintiffs' hostile work environment claim under Count IV of the Plaintiffs' Complaint.

BY THE COURT:

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HERBERT J. HUTTON, J.